Nos. 10-1891 & 10-1921

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, et al.

Plaintiffs-Appellees
v.

L-3 SERVICES, INC. and ADEL NAKHLA

Defendants-Appellants

On Appeal from the United States District Court for the District of Maryland
Case No. 08-cv-1696 (Hon. Peter J. Messitte)

PETITION FOR REHEARING AND REHEARING EN BANC

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PRELIMINARY STATEMENT

Plaintiffs are 72 Iraqi citizens who were tortured by employees of defendant-appellee L-3, a military contractor that assisted the U.S. military with detention and interrogation operations in Iraq. Over a strong dissenting opinion by Judge King explaining that this court was "unquestionably bereft of jurisdiction," *Al-Quraishi v. L-3 Servs., Inc.*, No. 10-1696 (4th Cir., Sept. 21, 2011), slip op. at 26, the panel majority (Niemeyer, J. and Shedd, J.) expanded the category of interlocutory appeals this Court can hear pursuant to the otherwise highly constrained "collateral order" doctrine. Having done so, the majority reached the merits of L-3's appeal and reversed the district court's thoughtful decision denying L-3's motion to dismiss it from this suit for the horrific wrongs committed against plaintiffs. According to the majority, L-3 is entitled to "battlefield preemption," which it described as "the *complete eradication* of…tort law, that is the complete removal of even the *possibility* of suit from the battlefield." *Al-Quraishi*, slip op. at 9 (emphasis added).

Review of this decision by the full court is warranted for two reasons. First, the panel majority's lack of clarity regarding the scope of its judgment requires en banc review. The judgment could potentially be read to dismiss plaintiffs' entire case, including plaintiffs' federal Alien Tort Statute ("ATS") claims. The validity of those claims, however, was not addressed in any way by the panel majority's

reasoning regarding federal preemption of plaintiffs' state law claims. *See Al-Quraishi*, slip op. at 14 n. 4 (King, J., dissenting) (identifying ambiguity in the majority's order but reading it to preserve plaintiffs' federal ATS claims).

Second, the panel majority's unprecedented expansion of the "collateral order" doctrine usurps the congressional prerogative to define the scope of federal appellate jurisdiction, *see Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 609 (2009); does "violence" to recent Supreme Court admonitions against judicially-created exceptions to the final judgment rule, *Al-Quraishi*, slip op. at 18 (King, J., dissenting); and puts this court in direct conflict with sister circuits that have considered the same issue. *See, e.g., Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259 (9th Cir. 2010); *Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010). Congressional limits on jurisdiction cannot be undone in order to advance judicial policy goals.

ARGUMENT

The Plaintiffs adopt and incorporate by reference the arguments in the Petition for Rehearing En Banc in *Al Shimari v. CACI International, Inc. Al Shimari v. CACI Int'l., Inc.*, No. 09-1335, which provides an independent basis for the full court's review. This Petition separately addresses the panel majority's novel expansion of the collateral order doctrine to assert jurisdiction over the district court's otherwise unappealable interlocutory order.

I. REHEARING IS WARRANTED TO CLARIFY THE SCOPE OF THE PANEL'S JUDGMENT.

The majority held that "the plaintiffs' state law claims are preempted by federal law and displaced by it." *Al-Quraishi,* slip op. at 5; *Al Shimari*, slip op. at 3. As the dissent notes, *Al-Quraishi,* slip op. at 14, n.4 (J. King), the majority did *not* address the district court's ruling that plaintiffs' federal law claims under the Alien Tort Statute could proceed. *See Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 741-60 (D. Md. 2010). Nonetheless, the majority's order could be read as an instruction to the district court to dismiss the plaintiff's case in its entirety. Judgment, *Al-Quraishi v. L-3 Servs., Inc.*, No. 08-1696 (4th Cir., Sept. 21, 2011) ("In accordance with the decision of this court, the judgment of the district court is reversed. These cases are remanded to the district court for further proceedings consistent with the court's decision.").

While Plaintiffs fully agree with Judge King's interpretation that the judgment – predicated as it was on a discussion of preemption of state law claims – cannot be read to dismiss the federal ATS claims, Plaintiffs respectfully request that the panel or the full court clarify or amend the judgment to eliminate any ambiguity about its proper scope and prevent a miscarriage of justice.

II. EN BANC REVIEW IS WARRANTED BECAUSE THE PANEL MAJORITY IMPROPERLY EXPANDED THE COLLATERAL ORDER DOCTRINE

As Judge King forcefully demonstrates in dissent, under the extant rules governing interlocutory appeals and the collateral order doctrine, this court is "unquestionably bereft of jurisdiction." *Al-Quraishi*, slip op. at 26. Nevertheless, the panel majority ignored the stringent *jurisdictional* limitations on the collateral order doctrine, in order to advance a broad, albeit misdirected, *substantive* policy aim – preventing any "judicial scrutiny of military policies and practices" in a war context. *Al-Quraishi*, slip op. at 8; *id.* (appellate jurisdiction over "battlefield preemption must also be recognized in order to prevent judicial scrutiny of an active military zone")[1]

This judicially-constructed policy rationale for assuming interlocutory jurisdiction runs directly contrary to recent Supreme Court admonitions against the expansion of the collateral order doctrine. *See Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 604-05 (2009); *see also Al-Quraishi*, slip op. at 18 ("it is impossible to overstate the violence that the majority does to the Court's" constraints on the collateral order doctrine). Accordingly, the decision makes this court an outlier

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[1] Torture and abuse of these civilian prisoners cannot properly be characterized as being a part of genuine combatant activities. *See* Petition for Rehearing En Banc, *Al Shimari v. CACI, Int'l, Inc.*, No. 09-1335; *see also United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009).

among the circuits, which have uniformly declined to expand the collateral order doctrine to encompass denials of motions to dismiss premised on Federal Tort Claims Act (FTCA) preemption grounds. *See Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259 (9th Cir. 2010) (discretionary function-based preemption); *Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010) (combatant activities-based preemption); *Harris v. Kellog, Brown, & Root*, 618 F.3d 398 (3d Cir. 2010) (combatant activities-based preemption). The panel majority provides the federal government a freedom from judicial scrutiny the executive branch itself has never even requested. *See Al-Quraishi*, slip op. at 21-22 (King, J., dissenting) (neither the military nor the Solicitor General's office has ever sought to support or intervene on the military contractors' behalf to protect any supposed interest in "battlefield preemption").

The panel's decision cannot be limited to this extraordinary case; it will require future panels in this court to consider a new class of interlocutory appeals when defendants assert an entitlement to dismissal based on a federal interest in preempting state law.

A. This Case Does Not Meet the Stringent Requirements of the Collateral Order Doctrine

Congress, not the courts, sets the scope of the federal judiciary's jurisdiction. U.S. Const. Art. III. Congress has expressly limited the appellate jurisdiction of the courts to review of "final decisions of the district courts," 28 U.S.C. § 1291 or a

discrete set of interlocutory appeals pursuant to §1292, all in order to achieve "judicial efficiency and . . . limit litigation costs" by avoiding "piece-meal" appeals. *Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 294-95 (4th Cir. 2008); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). As the Supreme Court held in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), section 1291 includes a "small class" of collateral rulings that are appropriately deemed final because they: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action, *and* (3) are effectively unreviewable on appeal from a final judgment. *See Mohawk Indus.*, 130 S. Ct. at 604-05.

"The conditions are 'stringent,' and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further." *Will v. Hallock*, 546 U.S. 345, 349-50 (2006) (citations omitted). The collateral order doctrine is of "modest scope" and, although the Supreme Court "has been asked many times to expand the 'small class' of collaterally appealable orders, [it] has kept it narrow and selective in its membership." *Id.* at 350; *Mohawk Indus.*, 130 S. Ct. at 609. This is because the courts of appeals' jurisdiction should presumptively come from Congress, "not expansion by court decision." *Mohawk Indus.*, 130 S. Ct. at 609; *see also Swint v. Chambers County*

Comm'n, 514 U.S. 35, 48 (1995) (admonishing against the "expansion [of appellate jurisdiction] by court decision").

The panel majority collapses the three *Cohen* factors into a single inquiry that overlaps entirely with its disposition of the case on the merits: whether "battlefield preemption" must be recognized "in order to prevent judicial scrutiny of an active military zone." *Al-Quraishi*, slip op. at 8. In other words, because the panel majority concluded that as a matter of public policy, L-3 and similarly-situated defendants should be free from liability for their actions in a war zone, it held that they should be categorically immune from suit. Freedom from liability, however, is a distinct inquiry that does not control freedom from suit. *See Al-Quraishi*, slip op. at 16 (King, J., dissenting) (key inquiry under *Cohen* collateral order doctrine is "'whether the essence of the claimed right is a right not to stand trial,'—that is, whether it constitutes an immunity from suit.") (quoting *Van Cauwenberghe v. Baird*, 486 U.S. 517, 524 (1988)).

The Supreme Court has repeatedly admonished against conflating these inquiries in a way that would expand the class of appeals subject to review under the collateral order doctrine. *Midland Asphalt Corp. v. United States,* 491 U.S. 794, 801 (1989) ("[o]ne must be careful…not to play word games with the concept of a right not to be tried."). Because "in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand

trial," *Van Cauwenberghe*, 486 U.S. at 524, the Court demands that the courts of appeal "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994). The "right not to be tried in the sense relevant to the *Cohen* exception rests upon an *explicit statutory or constitutional guarantee* that trial will not occur." *Midland Asphalt*, 489 U.S. at 801 (emphasis added); *see also United States v. Ferebe*, 332 F.3d 722, 747 (4th Cir. 2003). No such guarantee exists in this case.

B. Because the Government Contractor *Defense* of Battlefield Preemption Is Not a Statutory or Constitutional *Immunity* from Suit, Interlocutory Appellate Jurisdiction is Not Appropriate.

Defendants L-3 and CACI seek to invoke preemption under the "combatant activities" exception to the FTCA as a defense to this suit. As the dissent, the Supreme Court, and several sister circuits recognize, such an interest in preemption is merely that – a defense to liability, not an immunity from litigation. Specifically, military contractors cannot point to any "explicit statutory or constitutional guarantee that trial will not occur." *Midland Asphalt*, 489 U.S. at 801.[2]

[2] Thus, this case is unlike those in which the Court has recognized immunity. Compare *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43, 747-48 (1982) (absolute Presidential immunity from damage suits); *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) (recognizing absolute immunity for judges, prosecutors, and witnesses because of firm roots in the common law, but holding Attorney General not absolutely immune from damages suit arising from allegedly unconstitutional conduct); *Abney v. United States*, 431 U.S. 651 (1977) (absolute immunity from trial under Double Jeopardy clause). *See also Mangold v. Analytic Svcs., Inc.*, 77 F.3d 1442 (4th Cir 1996) (substantial claim of contractor immunity in connection

The statute on which the majority relies to support a broad preemption defense, the FTCA, specifically *excludes* contractors from the definition of a "federal agency" entitled to sovereign immunity. 28 U.S.C. § 2671 ("[T]he term 'Federal agency'…does not include any contractor with the United States."). In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988), the judicial source of the preemption found by the panel majority, the Supreme Court recognized "the absence of legislation specifically immunizing Government contractors from liability." The Court concluded that the derivative FTCA preemption was a defense to judgment, and did *not* hold it was equivalent to a claim of immunity, i.e., a right to be free from bearing any burdens of trial. *Id.* at 505 n. 1 (rejecting claim that contractors may be eligible for official immunity); *id.* at 514 (concluding that "whether the facts establish the conditions for the *defense* is a question for the jury.") (emphasis added). As Judge King emphasized in dissent, "[s]tate law claims are preempted under *Boyle* simply because *imposing liability* in such situations is irreconcilable with uniquely federal interests." *Al-Quraishi*, slip op. at 20 (emphasis added). Indeed, even the panel majority characterized *Boyle* preemption as merely precluding "state law *liability* where such protection was necessary to safeguard uniquely federal interests." *Al Shimari*, slip op. at 7-8 (emphasis added). As such, "nothing is irretrievably lost by the lack of an immediate appeal from an

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with government fraud investigation due to common law tradition of protecting cooperating witnesses).

adverse pretrial ruling." *Id.* at 18 (King, J., dissenting) (citing *Rodriguez*, 627 F.3d at 1266).[3]

The majority's attempt to equate *Boyle* preemption with federal sovereign immunity is not persuasive. *See Al-Quraishi*, slip op. at 19-20 (King, J., dissenting). As the Ninth Circuit explained, *Boyle*'s "government contractor defense does not actually confer sovereign immunity on contractors"; rather, it "is only a corollary financial benefit flowing from *the government's* sovereign immunity." *Rodriguez*, 627 F.3d at 1265. As such, the denial of the defense can be reviewed following final judgment, and is not immediately appealable. *Id.* Similarly, as the Fifth Circuit concluded, the denial of a claim of preemption by the "combatant activities" exception "may be reviewed on appeal from a final judgment under § 1291, or in an appropriate case, under § 1292(b)." *Martin v. Halliburton*, 618 F.3d 476, 486-87 (5th Cir. 2010). The Fifth Circuit explained that this preemption defense "is not subject to a *sui generis* exemption from the ordinary jurisdictional requirements for denials of preemption claims." *See also Harris v. Kellogg, Brown, & Root,* 618 F.3d 398 (3d Cir. 2010) (premature to

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[3] *See also United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall,* 355 F.3d 1140, 1147 (9th Cir.2004) ("the government contractor defense does not confer sovereign immunity on contractors"); *Joy Global, Inc. v. Wis. Dep't of Workforce Dev. (In re Joy Global, Inc.),* 257 F. App'x 539, 541 (3d Cir.2007); *Ultra-Precision Mfg. Ltd. v. Ford Motor Co.,* 338 F.3d 1353, 1359 (Fed.Cir.2003); *Jordan v. AVCO Fin. Servs. of Ga., Inc.,* 117 F.3d 1254, 1257 (11th Cir.1997); *Wood v. United States,* 995 F.2d 1122, 1130 (1st Cir.1993).

review decision not to dismiss complaint on grounds of combatant activities preemption); *McMahon v. Presidential Airways*, 502 F.3d 1331, 1366 (11th Cir. 2007) (declining to exercise pendant appellate jurisdiction over contractor's claim of combatant activities preemption, without even considering possibility that an affirmative preemption defense was a an independent basis for collateral order review).

Even in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), on which the panel majority so heavily relies, the D.C. Circuit did not view the preemption defense granted as one tantamount to full immunity from suit. The D.C. Circuit assumed appellate jurisdiction under the normal, congressionally-sanctioned mechanisms of § 1291 and § 1292(b), and not pursuant to the collateral order doctrine. The *Saleh* majority concluded that it was theoretically possible that "a service contractor might be supplying services in such a discrete manner-perhaps even in a battlefield context-that those services could be judged separate and apart from combat activities of the U.S. military." *Saleh*, 580 F. 3d at 9. The United States relied on this language in opposing *certiorari* in *Saleh*. Brief of United States as *Amicus Curiae* at 18, *Saleh v. Titan Corp.*, No. 9-1313 (U.S. May 2011). *See also Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10, 17-18 (D.D.C. 2005) (in companion case to *Saleh*, court concludes that limited discovery is needed because

"preemption under the government contractor defense is an affirmative defense, with the burden of proof on the defendants.").

C. The Panel Majority's Conjecture About the Perils of Discovery Does Not Justify Immediate Appeal

The panel majority concluded that the mere *possibility* of discovery threatens military operations and the executive's interest in separation of powers to a degree that warrants immediate review. *Al-Quraishi,* slip op. at 10. However, the mere prospect that an interrogatory or deposition might, at some future date and circumstance impose a burden on military officials cannot justify granting defendants *de facto* immunity from suit and permit an immediate appeal to this court. First, the fear of disruptive discovery appears strongly overstated. For example, as the D.C. Circuit in *Saleh* itself acknowledged, the district court there conducted extensive discovery "regarding the military's supervision of the contract employees' as well as the degree to which such employees were integrated into the military chain of command," 580 F.3d at 4; yet, "none of the ill effects foretold by the majority" emerged. *Al-Quraishi*, slip op. at 21 (King, J., dissenting). Similarly, *Boyle* involved an appeal from a *jury verdict* for the plaintiff, without surfacing any harms to the military that would necessitate bypassing the strong presumption in favor of appeals from final judgments. *See id.* at 21 ("The *Boyle* and *Saleh* decisions themselves well illustrate the lack of intrusion that would result from deferring review until after entry of final judgment").

Second, district courts retain an arsenal of tools to limit potential disruption to the military. *See id.* at 22 (King, J., dissenting) (district courts can limit depositions, limit discovery to the contours of the preemption defense, the resolve defense first, or where necessary, employ the state secrets doctrine to protect sensitive military information); *Martin*, 618 F.3d at 487 (identifying variety of ways district court can take steps that show "respect for the interests of the Government in military matters" without resort to interlocutory review"). *See also* U.S. Army Regulation 27-10, Litigation, §§ 7-8, 7-9, 7-11 (authorizing soldiers to testify only if it will not "interfere seriously with the accomplishment of a military mission."), *Saleh*, 580 F.3d at 29 (Garland, J., dissenting); *Watts v. SEC*, 482 F.3d 501, 508-09 (D.C. Cir. 2007).[4]

The panel majority's heightened concern for protecting the U.S. military from any discovery or judicial scrutiny in connection with litigation against corporate defendants is especially misplaced, since such a concern has never even been raised by U.S. government itself in these cases. The U.S. government chose

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[4] Moreover, in this case, several of the Defendants' military co-conspirators have already participated in court proceedings, having been court-martialed, convicted and sentenced to imprisonment in Fort Leavenworth for their participation in torture. They were also sentenced to be dishonorably discharged after their prison terms ended. *See United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010); *United States v. Harman*, 68 M.J. 325 (C.A.A.F. 2010); *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010) (upholding sentences). Other witnesses are likely to have completed their military service.

not to intervene in these cases to assert any distinct federal or military interest. *Cf. Mohamed v. Jeppesen Data Plan*, 614 F.3d 1070 (9th Cir. 2010) (U.S. government intervened in suit against private contractor in order to assert government's state secrets defense.). Indeed, as the dissent noted, despite the discovery that occurred in *Saleh*, "the Solicitor General did *not* assert that discovery regarding whether a state law claim is preempted would so imperil federal interests as to justify collateral order review." *Al-Quraishi* slip op. 22. Rather, the Solicitor General expressed doubt about the *Saleh* Court's reasoning, but asked the Supreme Court to decline review in part because of the need for "further explication of those issues in concrete *factual* settings." (emphasis added). U.S. Br. *Saleh* at 18. Such review cannot occur without the kind of discovery the majority opinion here forecloses.

D. The Majority's Decision Opens the Door to Numerous Appeals to this Court Under an Expanded Collateral Order Doctrine.

Because collateral order jurisdiction is based "on the entire category to which a claim belongs" rather than an "individual jurisdictional inquiry," *Mohawk*, 130 S. Ct. 605, the panel's expansion of collateral order doctrine risks inviting a flurry of appeals where a government private entity has asserted a preemption defense. And, to the extent that granting jurisdictional discovery involving military or national security affairs satisfies the collateral order doctrine, this court may have to entertain immediate appeals of any case in which the government is denied a motion to dismiss brought under the political question or related separation-of-

powers doctrines. *Al-Quraishi*, slip op. at 24 (King, J., dissenting) (citing *Doe v. Exxon Mobile Corp.*, 473 F.3d 345, 351 (D.C. Cir. 2007)).

The panel's decision will likewise cause unnecessary confusion as litigants seek to conflate immunity and preemption for jurisdictional purposes. Indeed, this court would be required to make qualitative judgments about which types of claims of preemption or government contracts credibly impact substantial claims of immunity, without an adequate factual record and when such inquiries properly fall within the province of the district courts in the first instance. *Compare Richardson-Merrel Inc.* v. *Koller*, 472 U.S. 424, 436 (1985) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case" as "[s]imple jurisdictional rules promote greater predictability.").[5]

CONCLUSION

For the foregoing reasons, the Court should vacate the panel decision, rehear the appeal, and remand to the district court for discovery.

[5] For the reasons stated in Judge King's dissent, *Al-Quraishi* slip op. 24-25, this court also would not have pendant appellate jurisdiction over the government contractor defense.

Respectfully submitted,

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I hereby certify that on October 5, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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